Supreme Court of the United States

OCTOBER TERM, 1944.

No. 244.

WILLIAM C. DENNICK, ADMINISTRATOR OF THE ESTATE OF JEANNETTE E. DENNICK, DECEASED,

Plaintiff-Appellant,

vs.

THE MIAMI SAVINGS AND LOAN COMPANY, A CORPORATION,

Defendant-Appellee.

PETITION FOR REHEARING.

Now comes William C. Dennick, appellant, and respectfully petitions this Honorable Court for a rehearing herein on the question of whether there is a substantial federal question involved, and as grounds therefor states:

First. This court has been misled as hereinafter stated, into passing upon the wrong question.

Second. The question discussed in Hansberry v. Lee, 311 U. S., 32, 41, 42-3, is not the question involved in this case, nor does the answer to that question solve the question at issue in this case.

Third. This Honorable Court must have been misled by what the Court of Appeals and the Supreme Court of

Ohio said about this being a suit to "Reform books and records", and about "segregating a part of the entire fund".

There is no such remedy known to either law or equity as reformation of a debtor's notation on his books, of the interpretation he places on a contract. Otherwise most legal actions could be converted into equitable actions by merely placing an improper notation on a debtor's books.

Reformation is an equity remedy to make an instrument which creates or conveys a right, express the "intent" of the parties. The contract did express the intent and it was never reformed.

There was no "segregated", "created", or "protected" fund in the Smith case. No such question was involved, notwithstanding the statements of the Ohio courts.

Fourth. The question involved in this case is the same question involved in Hansberry v. Lee, 311 U. S., 32-40, wherein this court said:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in litigation in which he is not designated as a party or to which he has not been made a party by service of process."

This case does not involve an exception to the above rule.

It is true that this court has said on pages 41-42-3 in that case that where a person has been made a party by "representation", under certain circumstances, this court will not interfere.

The Smith v. Kroeger case was not a class suit, and Smith did not represent a class, and consequently this appellant was not a party by representation.

As Pomeroy says, Smith only brought a "bundle of suits" in one suit. Even if the suit had been an equity suit, which it was not, each person would have had the right to leave the Miami's notation on its books as to its claim stand, or bring suit to "reform" it, if he so desired, but Smith had no interest in establishing whether or not Dennick should have the books reformed to show that he was a creditor instead of a stockholder.

Neither did Smith have any interest in establishing the amount of any person's claim except his own. This court on pages 43 and 44 of the Hansberry v. Lee case, points out that in order to be representation, there must not be merely a similar issue but there must be a common or a joint issue.

Tenants of an apartment house may bring a class suit to determine whether the front entrance shall be left unbarracaded, but the tenants have neither a common nor a joint action for breach of their several leases, even if they are identical.

We knew when we filed this case in the Common Pleas Court that we could not win it in the state courts, and knew that we would have to keep the pleadings clear and concise, and the brief and argument intelligent in order to win in this court.

We knew we had a constitutional right to win or lose in this court on the case made out by the pleadings, and evidence if any. There was no evidence and the petition states that by virtue of a contract this plaintiff became a creditor of the defendant, and was such a creditor in the sum of $7,507.31 on April 18, 1933, and remained such creditor to the present time and that was admitted in the answer. There was no allegation in the answer that

plaintiff's legal action was converted into an equitable action to reform by virtue of the defendant making an improper notation on its books.

Nor does the answer say that either Smith or the appellant was entitled to participate in any separate or special fund. They were general creditors, not special creditors.

Wherefore, this appellant prays for a rehearing and a decision on the actual question involved, and says to this Honorable Court that he knew when he commenced this case that he could not win it in the state court on account of the Supreme Court decision in Smith v. Kroeger, and could not succeed in this court unless given an opportunity to brief and argue the same, and has stated clearly in his statement as to jurisdiction the vital issue in this case but thought the issue made by the pleadings would be the issue herein and that a statement thereof, without tearing down the state court's statement, would be sufficient.

Respectfully submitted,

CLIFFORD R. CURTNER,

ABRAHAM K. MECK,

Counsel for Appellant.

CERTIFICATE.

I, Abraham K. Meck, attorney for appellant do certify that in my opinion the foregoing petition for rehearing is well founded and is not presented for the purpose of creating a delay.

ABRAHAM K. MECK.